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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation,

Petitioner,

vs.

WILLIAM P. JACKSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

Petitioner, Seaboard Coast Line Railroad Company, respectfully prays that a Writ of Certiorari issue to review the final judgment of the District Court of Appeal, First District, State of Florida.[1]

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[1]The Florida District Court of Appeal was the final Court of Appeal, of right, in the instant case, as the Florida Supreme Court only maintains discretionary review by certiorari (Fla.App. R. 2.1(b)).

OPINIONS AND ORDERS BELOW

On June 19, 1970, the Circuit Court for Duval County, Florida, entered final judgment for William P. Jackson in the sum of $325,000.00, said final judgment being rendered on July 20, 1970, after denial of motion for new trial (App. 1). No formal opinion was rendered by the Circuit Court. However, in the order denying the post-trial motions, the trial court expressed the opinion that the verdict was based upon the Boiler Inspection Act count of the amended complaint[2] (App. 2). The opinion constituting the final judgment of the First District Court of Appeal, State of Florida, is reported at 256 So.2d 568 (App. 4). Rehearing before the First District was denied on February 7, 1972 (App. 10). The Florida Supreme Court denied certiorari (App. 11), and denied rehearing for certiorari (App. 12). Both Florida Supreme Court orders have not been reported at the time of filing of this petition.

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[2]The Court is of the opinion that the Verdict is based solely on the Boiler Inspection Act Count of the Amended Complaint (Count II); that there is evidence to support the Verdict as to that Count, and that there was no error at the trial which requires the setting aside of the Verdict and the granting of a new trial as to said Count II.

However, the Court is of the opinion that as to Count I, the Verdict is against the manifest weight of the evidence, and "is so grossly excessive as to shock the judicial conscience", because the negligent acts of the plaintiff were the primary legal causes of his injuries, and that plaintiff's negligence was so great that the Verdict should not be allowed to stand. Except for the fact that it would accomplish nothing, the "Motion for New Trial" would be granted on grounds 2, 3, and 4 thereof, or a Remittitur of $225,000.00 ordered on grounds 5, 6, 10, 11 and 12 of the Motion for Remittitur.

JURISDICTION

The date of the judgment of the Florida First District Court of Appeal opinion sought to be reversed is December 23, 1971 (App. 4). Rehearing was denied on Febraury 7, 1972 (App. 10). The Florida Supreme Court denied certiorari on April 25, 1972 (App. 11), and denied rehearing for certiorari on May 31, 1972 (App. 12).

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

I.

WHETHER A RADIO ATTACHED TO AN ENGINE IS A PART OR APPURTENANCE WITHIN THE BOILER INSPECTION ACT, TITLE 45, UNITED STATES CODE, SECTION 23.

II.

WHETHER A DEFECTIVE RADIO PROXIMATELY CAUSED PLAINTIFF TO INCUR INJURY AFTER THE PLAINTIFF INITIATED THE TRAIN MOVEMENT AND THREW THE WRONG SWITCH.

STATUTORY PROVISION INVOLVED

United States Code, Title 45:

> Section 23. "Use of unsafe locomotives and appurtenances unlawful; inspection and tests.
>
> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c.103, §2, 36 Stat. 913; Mar. 4, 1915, c.169, §1, 38 Stat. 1192; June 7, 1924, c.355, §2, 43 Stat. 659."

STATEMENT OF THE CASE

This cause was tried by a jury based upon an amended two-count complaint seeking relief under the Federal Employers' Liability Act (45 U.S.C. §51-60) and the Boiler Inspection Act (45 U.S.C. §22-34). The First District Court of Appeal concisely stated the facts material to the questions presented when it stated:

"... plaintiff Jackson was working as a switchman in the Baldwin yards of defendant Railroad. His employment encompassed the throwing of switches in channeling railroad cars to a specific sidetrack. In order to direct the engineer and others in the work crew, Jackson gave signals either by hand, lantern or radio. At about 8:00 p.m. on the night of the accident the switching crew composed of Jackson, the conductor, field switchman and the engineer was moving a cut of cars in the Baldwin yard from the main lead track onto the No. 19 track. To accomplish the move it was necessary for Jackson to throw the No. 3 switch and then throw the No. 19 switch. Signals given to effectuate the movement were transmitted by Jackson's portable radio. Jackson erroneously threw a switch which put the cut of cars on the wrong track. After erroneously throwing the switch, Jackson called to the engineer on his radio advising him to move the train by saying, 'Come ahead.' The field switchman testified that he heard Jackson's transmission on his portable radio and he was fearful that the engineer did not receive Jackson's signal. For this reason he relayed the signal to the engineer on his radio. The movement was initiated and Jackson was struck by the cut of cars severing both his legs." (256 So.2d 568, 9)

The railroad, at the close of plaintiff's case, moved for a directed verdict, contending in part that a radio is not a part or appurtenance under the Boiler Inspection Act. It was further contended the alleged defective radio was not a proximate cause of the injury, as the plaintiff

initiated the train movement and threw the wrong switch (Trial Transcript 810-817). At the close of all the evidence the motion was renewed and again denied (Trial Transcript 888-889). The defendant next moved for judgment notwithstanding the verdict, alleging in part the grounds delineated above (App. 12). On appeal to the First District Court of Appeal the same grounds were alleged, and the Court responded:

> "The Railroad contends that at the conclusion of plaintiff's case its motion for directed verdict should have been granted because: (1) an engine radio is not an appurtenance under the Boiler Inspection Act; (2) plaintiff failed to establish any evidence of a defective condition in the engine radio; and (3) assuming the failure of the engine radio, it was not the proximate cause of the plaintiff's injuries.
>
> "The Boiler Inspection Act provides in part:
>
> 'It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and *appurtenances* thereof are in proper condition and safe to operate' . . . " (emphasis supplied)
>
> "Although the Railroad concedes that a radio was installed on the locomotive, it strenuously argues same was not an appurtenance within the meaning of the Boiler Inspection Act. The Railroad cites Southern Railway Co. v. Lunsford as the leading case on this point. There, the Supreme Court was confronted with an experimental device called 'Wright's Little Watchman,' and in holding same was not an appurtenance stated:

" 'With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not.'

"The Railroad then reasons that the engine radio was not essential to the operation of a yard locomotive since movement of railroad cars had been conducted earlier on the evening of the accident by means of hand signals. Further, since there was no evidence that the Interstate Commerce Commission had promulgated any rules governing the use of a radio on a locomotive, the Boiler Inspection Act does not apply to this device.

"In the case of Southern Railway Company v. Bryan the Fifth Circuit Court of Appeals in construing the Boiler Inspection Act stated:
" ' . . . All of the federal safety laws in Chapter 1, Title 45, U.S.C., are in pari materia and must be liberally construed in connection with the federal remedy provided in Chapter 2 of such title to carry out their remedial and humanitarian purposes.'

"And in Fritts v. Toledo Terminal R. Co., the federal Supreme Court held that the seat upon which the engineer sat while operating a locomotive was a 'part and appurtenance' of the engine, the defective condition of which would impose absolute responsibility upon the railroad.

"[1] This record reveals that such radios have been utilized by the railroad industry for a numof years to facilitate the movement of cars in switching and yard operations. We hold that the engine radio here considered was clearly a 'part and appurtenance' as within the meaning of the Boiler Inspection Act.

"[2] We next consider appellant's assertion that the plaintiff failed to establish any evidence of a defective condition in the engine radio. Competent testimony was adduced and presented to the jury by plaintiff as to the defective condition of the engine radio. The trial judge was correct in denying the Railroad's motion for a directed verdict and properly submitted the conflicting evidence to the jury. As to the Railroad's contention that the failure of the radio was not the proximate cause of Jackson's injury, we observe that the evidence is undisputed that had Jackson's transmission been received by the engineer, Jackson would not have left his place of safety."

REASONS FOR GRANTING THE WRIT

I.

THE QUESTIONS PRESENTED HERE ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

A. THE FEDERAL QUESTIONS INVOLVED ARE OF GREAT CONCERN TO A NATIONWIDE INDUSTRY THAT IS ECONOMICALLY BEING HARMED IN PART BECAUSE OF CONFLICTING JURISDICTIONS.

This Court has never clearly indicated what a "part or appurtenance" of a locomotive is. In 1936 in *Southern Railway Co. v. Lunsford*, 297 U.S. 398, 56 S.Ct. 504, 80 L.Ed. 740, this Court did say:

> "With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commis-

> sion, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability."

It should be noted that no evidence was introduced indicating the Interstate Commerce Commission (now the Department of Transportation — Pub.L.89-67) has promulgated any rules governing the use of a radio on a locomotive.

The Ohio Supreme Court, in a case similar to the instant one, stated:

> "It may be noted that the Federal Safety Appliance Act *does not* provide for a properly functioning radiotelephone and the only basis for recovery relied upon by plaintiff in the instant case is the alleged defective hand brake." (*Reed v. Pa. Rd. Co.*, 171 Ohio St. 433, 171 N.E.2d 718, cert den., 366 U.S. 936, 81 S.Ct. 1661, 6 L.Ed.2d 847) (emphasis supplied)

The highest Florida Appellate Court in the instant case disagrees with the Supreme Court of Ohio.

Petitioner prays this Court review and clearly delineate the meaning of the words "part or appurtenance thereto." Surely, in 1911 when the Boiler Inspection Act was passed, Congress was not thinking a radio was part of an engine!

It was conceded the basic intent on the Boiler Inspection Act was safety. The petitioner agrees that safety in operating engines is necessary and would agree that, under the Act, all parts of an engine actually used to make it function *mechanically* should be included. Petitioner strenuously states that a "malfunctioning" radio should not be considered a part or an accessory of an engine, thereby creating absolute liability because of the alleged malfunction. Should all optional equipment not required for the safe operation of an engine be considered a part thereof, e.g., a refrigerator for the engineer's lunch?

In the instant case the employee was not harmed electrically because of the radio, nor was he injured in any way because of its physical presence in the engine. The employee was injured because he threw the wrong switch and then called for the train to move. Even if it be argued that the engineer did not hear the plaintiff's radio signal and then moved on a radio signal given by a fellow employee who did hear it, the train movement proceeded just as the plaintiff-employee wanted it to proceed.

Would one consider a radio necessary for the safe operation of a taxi? Certainly, if the taxi's radio ceased functioning and the taxi was in an intersectional accident because it ran a red light, would one find fault with the radio? We respectfully submit that the Court should consider what is necessary for the safe operation of an engine, but certainly not include every possible addition thereto. The petitioner prays that this Court will interpret the words "and all parts and appurtenances thereof" to mean those parts and appurtenances directly necessary to the actual mechanical operation of the engine.

B. THIS CASE IS IDEALLY SUITED TO DETERMINE IF BOILER INSPECTION ACT JURY VERDICTS CAN EVER BE JUDICIALLY SUPERVISED.

Although there is absolute liability under the Boiler Inspection Act and Safety Appliance Act, the plaintiff must still prove that the defective radio was a *proximate cause* of the plaintiff's injuries. This Court stated:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an *incidental condition or situation* in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." (*Davis v. Wolfe*, 263 U.S. 239 at 243, 44 S.Ct. 64, 68 L.Ed. 284.) (emphasis supplied)

This Court later stated, in *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, a Federal Employers' Liability Act case (comparative negligence), not a Boiler Inspection Act Case (absolute liability), as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that *employer negligence played any part, even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." (emphasis supplied)

The test of a jury case and proximate cause test contained therein, established in *Rogers* (F.E.L.A. negligence) should not apply to an absolute liability statute, i.e., Boiler Inspection Act. It is wrong to say, "that employer negligence, even the slightest," creates absolute liability when *Davis* indicates the failure (whether negligent or not) to comply with the Boiler Inspection Act may be "an incidental condition or situation" and *not* the *proximate cause* of the injury. Judicial supervision of jury verdicts under *Rogers* is non-existent. This situation should not be allowed to inundate absolute liability statutes.

In the instant case the plaintiff admitted throwing the wrong switch. The plaintiff then initiated the train movement. What difference did it make if his call to the engineer started the train or that his call was relayed to the engineer and the train started? *The radio on the*

engine, whether partially operative or not, did its job, i.e., the train began to move. At this point the radio's function, whether operative or not, stops. It seems ludicrous when a man can admit (a) "I threw the wrong switch," (b) "I started the train," (c) "I was injured, yet the railroad is at fault because my instruction to move the train was relayed to the engineer instead of being directly received."

Assuming the plaintiff himself moved after giving his radio signal, it is petitioner's contention that once the signal was received by the engineer, whether or not there even was a radio on the engine had nothing to do with proximately causing plaintiff's injuries. If a man calls a taxi and is standing in the street and is struck by the taxi when it arrives, what difference does it make if he used a radio to call the taxi or a hand signal? The man requested it; it came; and his sole negligence caused the injury.

The plaintiff contends the railroad can only be absolved if the railroad was acting in a vacuum, as even the slightest incidental condition creates absolute liability. The petitioner prays that this Court define proximate cause as used within the Boiler Inspection Act.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

DATED: August ____, 1972.

Respectfully submitted,

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